NO. 80-793

In the
Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS J. RODRIGUE, JR.
Respondent

VERSUS

DIXILYN CORPORATION
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

OPPOSITION ON BEHALF OF LOUIS J. RODRIGUE, JR.
TO THE PETITION FOR WRIT OF CERTIORARI OF
DIXILYN CORPORATION

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The sole question presented in the petition for review is whether the Fifth Circuit Court of Appeal understood and correctly applied Louisiana substantive law when it held contributory negligence is not a defense to a cause of action under Louisiana Civil Code Article 2317. The Fifth Circuit knew that the Louisiana Supreme Court is the final expositor of Louisiana law. Had the Fifth Circuit found no clear and controlling precedent from Louisiana's highest court it could have certified the question to that court. La. R.S. 13.72 and Rule 12 of the Rules of the Louisiana Supreme Court. The Fifth Circuit's enthusiasm for the certification procedure when appropriate is evidenced by the great number of cases in which it has been invoked. *Olsen v. Shell Oil Co.*, 561 F.2d 1178, 1194 (5th Cir. 1977). *In Re McClintock*, 558 F.2d 732, 733, 734 (5th Cir. 1977)

THE FIFTH CIRCUIT'S DECISION RECOGNIZING THAT UNDER LOUISIANA LAW THE CONTRIBUTORY NEGLIGENCE OF THE PLAINTIFF IS NOT A DEFENSE TO AN ACTION PREDICATED ON STRICT LIABILITY UNDER LOUISIANA CIVIL CODE ARTICLE 2317 IS CORRECT

The panel that decided the case in the Fifth Circuit was comprised of Circuit Judges Wisdom, Fay and Tate. Both Judges Wisdom and Tate practiced law in Louisiana before becoming judges. Additionally Judge Wisdom served on the faculty of the Tulane Law School, and Judge Tate on the faculty of the law school of Louisiana State University. From 1970 until his appointment to the Fifth Circuit, Judge Tate served as an associate Justice of the Louisiana Supreme Court.

Two decisions of the Louisiana Supreme Court foretold the decision in the instant case. Both were authored by Judge Tate when he served on the Louisiana Supreme Court. In 1975, reversing prior case law to the contrary, the Louisiana Supreme Court held that Civil Code Article 2317 created strict liability for damage created by defects in a thing. *Loescher v. Parr,* 324 So.2d 441 (La. 1975) In that decision the court also noted defenses, those also available under Louisiana law to other strict liability causes of action. They are three: (a) fault of the victim, (b) fault of a third person, and (c) an irrestible force. In *Loescher* the third defense was at issue, in *Olsen v. Shell Oil Co.,* 365 So.2d 1285 the second was at issue, and here, the first is at issue. Both cases indicate contributory negligence is not a defense, but since that issue was not present, there was no such holding. The discussion in the Fifth Circuit's

opinion set out at A9-A16 is a clear and correct exposition of the relevant Louisiana law.

The petitioner's complaint is that there was no white horse case. But that is not to say that there was no clear controlling precedent in the decisions of the Louisiana Supreme Court. The Fifth Circuit Court of Appeal's opinion is in accord and not in conflict with the Louisiana Supreme Court decisions.

Respondent respectfully submits the petition for certiorari should be denied.

Respectfully submitted,

/S/ Carl. J. Schumacher, Jr.
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CERTIFICATE OF SERVICE

The undersigned counsel for respondent has caused three copies of the foregoing opposition to Petition for Writ of Certiorari to be served on John E. Galloway and Peter L. Hilbert, Jr. of McGlinchey, Stafford and Mintz, P.O. Box 2000, New Orleans, LA 70176 by placing same in the United States Postal Service, first class postage prepaid, this the 16th day of December, 1980.

/S/ Carl J. Schumacher, Jr.
Carl J. Schumacher, Jr.